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IN THE

Supreme Court of the United States

October Term, 1947

No. 783

MILTON A. FLOYD,
Petitioner (Plaintiff-Appellant below),

vs.

RING CONSTRUCTION CORPORATION, a Corporation, Respondent (Defendant-Appellee below).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent, Ring Construction Corporation, respectfully prays that the petition for writ of certiorari in the above entitled matter be denied.

I.

SHORT STATEMENT OF THE MATTER INVOLVED

The complete statement by the Circuit Court of Appeals in this case, found in 165 F. (2d) 125, will, of course, be before the Court.

We draw specific attention, however, to the Circuit Court's description of the nature of the action—to the significant words of the contract of employment—to the

prayer for relief—(page 128 of opinion), and to points three and four of the Opinion, dealing with the jurisdiction of a court of equity where the decree is dependent upon the "taking and stating of several accounts."

The sole question before this Court is whether or not the Circuit Court of Appeals erred in its conclusion that the denial to the plaintiff of a jury trial was not error.

Petitioner is wrong in stating, at page 2 of the petition, that the Circuit Court of Appeals "affirmed on the ground that error in denying a jury trial, if it were error, was 'immaterial,' because the evidence showed a practical construction of the contract and the trial court correctly adopted that construction."

The fact of the matter is that the Circuit Court affirmed on the ground that, "The evidence conclusively established that it would have been the Court's duty to direct a verdict for the defendant had the trial been to a jury," and, "The record compelled the finding that the share of the 'net profits' claimed by the plaintiff in this action did not accrue and was not payable during the pendency of the renegotiation proceedings" (165 F. (2d) 131).

II.

THE NATURE OF THE CASE

Under this heading, and subsequent headings, down to page 10 of the petition, the petitioner purports to discuss the facts and issues in the case, and the rulings of the Trial Court. We think the discussion may be misleading, and, therefore, submit the following:

The statement is made on page 3 of the petition that the contract dated April 1, 1942, found in the record on page 9, and executed after the passage of the Renegotiation Act, "is silent as to the effect of renegotiation." This is true only in the literal sense. As a matter of fact, the language of this contract conclusively determines that it

was made in the light of the Renegotiation Act, and with the express recognition of the fact that the plaintiff's compensation would be determined only after the amount of the renegotiation deduction had been determined and taken. This is made clear by the statement of the Circuit Court of Appeals in its opinion on page 130. On the record it cannot be denied that the agreement of Floyd indicated by his acceptance of the proposal in the Ring Construction Corporation letter quoted on page 130 of the opinion, is consistent only with the clear understanding as to the effect of the Renegotiation Act exactly as contended for by Ring Construction Corporation.

Of course, the Circuit Court did not rest its decision, "wholly upon the terms of the contract itself" (see page 8 of petition). It could have decided the case that way in our opinion, but there can be no impropriety in deciding the case upon the basis of all of the facts (see page 130, Circuit Court opinion). The Court took into account the testimony of the witnesses and, upon the basis of the entire record, came to the conclusion that the evidence, "conclusively establishes that it would have been the Court's duty to direct a verdict."

The opinion of the Circuit Court was without dissent.

That Court had the benefit of the petition for rehearing, which it denied.

III.

THE JURY WAS PROPERLY DENIED BECAUSE OF THE NATURE OF THE SUIT

Leighton v. Young, 52 F. 439, 442, cited on page 129 of the opinion.

The case of *Rivoli Drug Company v. Lynch,* 50 F. (2d) 536, contains the following statement:

> "Matters of account are per se within the scope of equity jurisdiction. No precise rule can be laid down as to the cases in which a court of equity will exer-

cise its jurisdiction. The court reserves itself a large discretion upon the subject, and will take or refuse jurisdiction according to the circumstances or the case. Corpus Juris, Vol. 21, par. 108b, p. 132. An accounting may generally be had in equity where funds or property are jointly owned and one party refuses to account to the other for his share thereof, if the remedy at law is inadequate. Corpus Juris, Vol. 1, par. 75b, p. 624. The existence of any confidential or fiduciary relation is sufficient to invoke such jurisdiction. This rule applies equally to trusts created by implication of law. Corpus Juris, Vol. 1, pp. 621, 622. Equity jurisdiction may be invoked in the adjustment of rights and interests of part owners. Corpus Juris, Vol. 1, p. 626."

The case of *Ramon Valdes v. Tulio Larrinaga,* 34 S. Ct. 750, 233 U. S. 705, was almost identical with this case, as to the nature of the contract. The Court said:

> "It is objected in the first place that the case is not one for equitable relief. But whether the contract created a partnership under the definition of the Civil Code of Porto Rico, par. 1567, as argued by the appellee, or not, it gave the appellee an equitable interest in the concession to the extent of securing his share of the profits, if any, and attached to these profits specifically if and when they came into being. Barnes v. Alexander, 232 U. S. 117, 121, 58 L. Ed. * * *, 34 Sup. Ct. Rep. 276. It established a fiduciary relation between Valdes, who had legal control, and the plaintiff."

See Volume I, American Jurisprudence, dealing with "accounts and accounting," where it states at page 298:

> "The jurisdiction of courts of equity to state and settle accounts, or to compel an accounting, is exercised also in a great variety of cases of original equity cognizance, such as those involving fiduciary and trust relationships, those wherein fraud is charged, and those wherein a discovery is sought."

The case of *Fechteler, et al., v. Palm Bros. & Co.,* 133 F. Rep. 462, contains the following statement at page 464:

> "This case involves contract and mutual accounting, and the entire transactions of two large mercantile establishments must be examined, and accounts compared. The production of books of account will be absolutely essential to the correct ascertainment of the basis upon which the amount due from one to the other shall be ascertained and this renders essential the functions of a master. It is clearly a case where the remedy in equity is more full and adequate. Story, Eq. Juris., pars. 67, 452, 457; Gunn v. Brinkley Carwords, 66 Fed. 382, 13 C. C. A. 529; Kirby v. R. Co., 120 U. S. 130, 134, 7 Sup. Ct. 430, 30 L. Ed. 569."

The syllabus reads as follows:

> "A bill for an accounting under a contract between two large mercantile houses, which required each to render to the other annually a statement of its entire business for the preceding year, and to pay to the other a percentage of its gross profits, states a case of equitable cognizance, on the ground that the remedy in equity, through a statement of the accounts by a master, is more complete and adequate than that at law by an action of account."

In *Kirby, Ex'r, etc., v. Lake Shore & M. S. R. Co.,* 120 U. S. 130, 7 S. Ct. 430, the Court stated at page 432:

> "The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled on each settlement. 1 Story, Eq. Jur., par. 451. Justice could not be done except by employing the methods of investigation peculiar to courts of equity. When to these considerations is

added the charge against the defendants of actual concealed fraud, the right of the plaintiff to invoke, the jurisdiction of equity cannot well be doubted."

The basis for the statement that the accounts were complicated is contained in the following quotation from the opinion:

"The settlements between the parties, it may be stated, covered more than 200 shipments of cattle and hogs, the freights upon which aggregated nearly $350,000, or about $9,000 per week, from June 10, 1870, to March 14, 1871, when the contract was canceled by mutual consent."

The mere fact that in our case we didn't actually go into accounting does not establish that the accounting would not have been complicated and difficult, as a matter of fact.

The case of *Goffe & Clarkener, Inc., v. Lyons Milling Co.*, 26 F. (2d) 801. First syllabus reads as follows:

"Account—4, 5 * * * Equity may decree accounting, if fiduciary relationship exists, or there are mutual accounts.

"Where a fiduciary relation exists, or where there are mutual accounts, equity may decree an accounting."

The Court said at page 802:

"The rule is concisely stated in Davis v. Marshall, 114 Va. 193, 76 S. E. 316, Ann. Cas. 1914B, 1028: 'The authorities generally support the view that the mere relation of an agent to his principal is of itself insufficient to entitle the agent to maintain a bill for an accounting against the principal.'

"There may be cases where in fact the principal has assumed a relation of trust with his agent, as, for example, where a salesman is entitled to a percentage of collections made directly by his principal, where the principal keeps the books and the agent has no knowledge, or means of knowledge, as to the

time or amount of such transactions. But that is not this case. The agent here knew all about every deal. As a matter of fact, the actual relationship here is more nearly akin to that of a merchant and his customer. An accounting here, as incidental to the enforcement of an equitable remedy against a fiduciary, cannot be had." * * *

"This does not, however, answer the proposition proposed. This is not a suit upon a policy of insurance, nor upon promissory notes. It is still a suit on an involved, complicated, although one-sided, account. And the courts have spoken on that proposition.

"The Supreme Court has squarely rested equity jurisdiction on this ground. In a case involving a one-sided, but complicated, account, jurisdiction was primarily held on account of the complication, and secondarily on fraud. The case is Kirby v. Lake Shore & M. S. Railroad, 120 U. S. 130, 7 S. Ct. 430, 30 L. Ed. 569, the court said:

" 'The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled on each settlement. 1 Story, Eq. Juris., p. 451. Justice could not be done, except by employing the methods of investigation peculiar to courts of equity. When to these considerations is added the charge against the defendants of actual concealed fraud, the right of the plaintiff to invoke the jurisdiction of equity cannot well be doubted.' "

There is much further extended and important discussion.

In the *Supplement to the Federal Rules* at page 148 there is a statement, as follows:

> "If an action for accounting was formerly cognizable in equity it is not triable of right by jury." (Citing Taylor v. McKeever (D.C. N.Y. 1940), 4 Fed. Rules Serv. 38a.2, Case 1.) The case is found also in 1 F. R. D. 565.

In that case there was a motion to transfer the case from the jury to the Court calendar. This was an action for an accounting.

> "The defendant, as alleged in the complaint, stood in a fiduciary relationship to the plaintiff; she received stocks and bonds from plaintiff with full authority to sell or purchase as she deemed best for the benefit of the plaintiff, whom she guaranteed against loss.
>
> "While plaintiff shows what stocks and bonds she delivered to defendants, she cannot determine or allege what defendant sold or purchased, or what became of the stocks and bonds so delivered by plaintiff to defendant * * *."

The Court granted the motion. The case seems to be quite clearly in point.

The case of *Dellefield v. Blockdel Realty Co.,* 1 Fed. Rules Decisions 689, N. Y. District Court, is a motion to strike the case from the jury calendar and transfer to the non-jury calendar. There were several counts involved in that case, the Court disposed of them differently. With respect to Count (8), based upon an allegation of partnership and a request for accounting, the Court said:

> "Count (8) of the complaint, although claiming a definite sum of money damages, is in reality for an accounting between partners growing out of their partnership and relationship thereto. Plaintiff is not entitled as a matter of right to have the issue of Count (8) tried by a jury."

The case of *Pallant v. Sinatra,* 59 Fed. Supp. 684. The issue arose on a motion to strike plaintiff's demand for a trial by jury of the third and fourth causes of action. The Court said at page 685:

"The first two causes of action are conceded to be causes of action in equity * * * hence triable by that court without a jury. The Third cause of action for a breach of implied trust is also an equitable action. Taylor v. McKeever (D. C.), 1 F. R. D. 565, 566. See Beatty v. Guggenheim Exploration Co., 225 N. Y. 380, 386, 122 N. E. 378.

"The Fourth cause of action is an incident to the equitable relief asked for in the first three causes of action and does not entitle plaintiff, under the circumstances, to a common law trial. Clark v. Wooster, 119 U. S. 322, 325, 7 S. Ct. 217, 30 L. Ed. 392; Pease v. Rathbun-Jones Engineering Co., 243 U. S. 273, 279, 37 S. Ct. 283, 61 L. Ed. 715, Ann. Cas. 1918C, 1147; Arnstein v. Twentieth Century Fox Film Corporation (D. C.), 3 F. R. D. 58; Williams v. Collier (D. C.), 32 F. Supp. 321. See also National Labor Relations Board v. Jones & Laughlin, 301 U. S. 1, 48, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352; Young v. Loew's, Inc. (D. C.), 2 F. R. D. 350.

"Motions granted."

Although no accounting was had in our case, it was not because defendant counsel conceded there was no dispute about the figures. The fact is that counsel for the plaintiff stated in the record on page 46 that counsel for the defendant had stated to the Court that there were items in disagreement. He further stated that the items have never been ironed out. Counsel for the plaintiff made a prima facie case which then seemed satisfactory to counsel for the defendant in the light of the state of the record, and at that time, and only under those circumstances, did it become unnecessary to have a full accounting.

IV.

THE CIRCUIT COURT WAS RIGHT IN HOLDING THAT EVEN IF PLAINTIFF WAS ENTITLED TO A JURY TRIAL, THERE WAS HARMLESS ERROR IN DENYING IT SINCE THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT IT WOULD HAVE BEEN THE COURT'S DUTY TO DIRECT THE VERDICT FOR THE DEFENDANT HAD THERE BEEN A TRIAL BY JURY.

In subdivision "a" under this point, it is urged that the right to a jury trial is a fundamental right. With this we have no quarrel, but it does not follow that the Circuit Court was wrong. Cases speaking of the fundamental importance of a jury trial are not in point. The case of *Slocum v. New York Life Insurance Company,* 228 U. S. 364, 398, 57 L. Ed. 879, 894, seems to be the case upon which petitioner principally relies. That case, in which the opinion was written by Mr. Justice Van DeVanter, merely held that when the Court found the evidence insufficient to sustain the verdict for the plaintiff, its duty was to grant a new trial, rather than direct a verdict for the defendant. Mr. Justice Van DeVanter also wrote the opinion in the case of *Baltimore & Carolina Line Inc., v. Redman,* 295 U. S. 654, 55 S. Ct. 890, in which he explained and distinguished the Slocum case with the one he was then discussing. He pointed out that in the Slocum case the verdict for the plaintiff was taken unconditionally, and not subject to the Court's opinion of the sufficiency of the evidence—that in the Baltimore & Carolina Line case the trial court expressly reserved its ruling on the defendant's motion to dismiss, and for a directed verdict. Concerning that case, the Court said that whether the evidence was sufficient or otherwise was a question of law to be resolved by the Court. The verdict for the plaintiff was taken, pending the Court's ruling on

the motions and subject to those rulings. After the verdict was given, the Court considered the motions pursuant to the reservation, held the evidence sufficient, and denied the motions. The Court of Appeals held the evidence was INSUFFICIENT to support the verdict for the plaintiff, that the defendant's motion for a directed verdict was accordingly well taken, and, therefore, the judgment for the plaintiff should be reversed. The opinion concludes:

> "In view of the common-law practice and the related state statute, we reached a conclusion that the judgment of reversal for the error in denying the motions, should embody a direction for a judgment of dismissal on the merits and not for new trial. Such a judgment of dismissal would be the equivalent of a judgment for the defendant on a verdict directed in his favor."

The Court then proceeds to overrule the Slocum case in so far as its language conflicted with its decision in the Baltimore & Carolina Line case.

The case of the *Gasoline Products Company v. Champlin Refining Company,* 283 U. S. 494, 51 S. Ct. 513, also discusses the case of *Slocum v. New York Life Insurance Company,* and says on page 514 of the reported opinion that the Slocum case "decided only that an Appellate Federal Court may not direct judgment non obstante veredicto, solely because the verdict given is not sustained by the evidence, but, in that event, must order a new trial."

See also *Southern Pacific Co. v. Pool,* 160 U. S. 438, 16 S. Ct. 338, where the Court said that:

> "Where the evidence is undisputed, or is so conclusive that the Court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it, the Court may withdraw a case from the jury altogether and direct a verdict for the plaintiff or the defendant, as may be proper."

To the same effect, see *Empire State Cattle Co. v. Atchison, Topeka & Santa Fe Railway Co.,* 210 U. S. 1, 28 S. Ct. 607.

See also *Gunning v. Cooley,* 281 U. S. 90, 50 S. Ct. 231.

The cases cited on page 18 of the petition are not in point. In none of those cases did the issue we are concerned with arise. Of course, it is not always harmless error to deny a jury trial. The same is true of the cases cited on page 19.

We concede the point made at subdivision "b" of point II on page 20 of the petition, but assert that it DOES affirmatively appear from the record that if a jury trial was authorized or required, its denial was not prejudicial. The discussion of the record by the Circuit Court of Appeals is amply adequate to sustain this statement. Nor do we deny the rule requiring that such a showing concerning lack of prejudice be beyond reasonable doubt and much more than a preponderance in favor of the defendant.

Of course, this Court may examine the whole record as was done by the Court below. In the opinion of the Circuit Court, the evidence was conclusive in favor of the defendant, as stated both by the Trial Court and the Circuit Court of Appeals. We now confidently again assert that it was, and "there was no issue of fact to submit to the jury." The evidence in the record was such that it would have required a verdict for the defendant, and the failure to grant a motion for such a verdict would have been error. The statement by both the Trial Court and the Circuit Court of Appeals as to the state of the record upon the basis of which they both came to the conclusion that the evidence was conclusive in favor of the defendant and against the plaintiff would seem to require no further discussion.

The mere fact that the Trial Court said that the testimony of the plaintiff as to one particular matter was

"simply incredible," does not militate in the slightest degree against the right and duty of the Court in this case to find that "the only inference to be drawn is that the plaintiff clearly understood that his compensation was dependent upon the renegotiation."

The quotation from the opinion of the Circuit Court given on page 24 of the petition has to do with an immaterial and preliminary matter. The question of whether or not the plaintiff was to do more or less estimating has no bearing whatsoever upon the issues in the case.

At this point in the petition we find the SECOND reference to the supplemental agreement signed in September of 1942; here (at page 24) the petitioner boldly asserts that that agreement "neither stated nor implied that possible renegotiation was taken into account." As a matter of fact, the agreement, written in the light of the undisputed facts in the case, makes it perfectly clear that the parties had the renegotiation law, and its application to the contract, so clearly in mind that it wasn't even thought necessary to make a specific reference to it.

Petitioner proceeds on page 24 to the bottom of page 29 to quote specific findings of the Court, leading to the facts upon the basis of which the Court arrived at its conclusion, that the issue was conclusively in favor of the defendant. Instead of referring to the evidence bearing upon these findings, the petitioner contents himself with quotations from his petition for rehearing. These quotations are mere arguments and are not tied to the testimony, to any substantial or material extent. This has already been dealt with adequately by the Circuit Court. We see no need of making any extended answer to these assertions. The transcript of the record contains all the references to the testimony and amply justifies and supports the conclusion of the Court in this connection.

If the Court cares to look at the references to the record given in the petition, the Court will find our position fully sustained.

Now, with respect to the conduct of the defendant and his counsel, said to be inconsistent with their position in this case (see petition, page 31). Of course, in its statement of "project costs" to the Government in connection with the renegotiation proceedings, the defendant, relying on the invalidity of the Renegotiation Act, as applied retroactively to its contract with the Government, could do no other, than assert the Floyd claim for the full amount. In the defendant's controversy with the Government, his position was that the Renegotiation Act was invalid. In its litigation with Floyd, its position was that the validity or invalidity of the Act had not yet been determined. Everything that the defendant said and did in connection with the litigation with the Government was necessarily based upon the claim that the Renegotiation Act was invalid. In the light of that claim, the defendant's treatment of its income taxes and renegotiation claims necessarily present inconsistencies, or seeming inconsistencies, with its position in the Floyd case. If and when the defendant's position with respect to the Renegotiation Act is sustained, there will be no further dispute with Mr. Floyd; his claim will be paid in full. If the defendant's position with respect to the Renegotiation Act is not sustained, then there is no reason why Floyd (and Wiik, who has an identical claim) should be paid a percentage of profits which the Ring Construction Company did not earn or keep.

For the respondent to go through the record to any greater length than has already been done in this brief would require summarizing the testimony again. That testimony is already summarized in the printed transcript of record now before this Court. This transcript has already had the attention of the Circuit Court of Appeals, and we are constrained to believe that if what we say here, plus what has been said by the Circuit Court of Appeals, is not sufficient to convince the Court that the

Circuit Court of Appeals was correct as to the facts, there will be no recourse but to burden this Court with the necessity of examining the complete record now before it. We trust this will not be necessary. We do not believe at this time we are called upon to summarize the evidence any further.

V.

IS THERE AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN DECIDED BY THIS COURT, AND IF SO, SHOULD CERTIORARI BE GRANTED IN THIS CASE SO THAT SUCH POINT MAY BE SETTLED?

As we understand this point, on the basis of the petition, it may be stated as follows: Assuming that in a jury case it is proper for a Court where the facts conclusively support a defendant to direct a verdict for the defendant, is it harmless error for a Court to render judgment for a defendant under the same circumstances where a jury has been improperly denied to the plaintiff?

For the purpose of this discussion, we assume it to be well established that the Court may direct a verdict under the circumstances assumed and that it would have been proper for the Court to do so in the instant case if there had been a jury.

It is further to be noted that this is the only ground relied upon by the petitioner in his brief in support of the motion (see page 38 of the petition).

The point is stated as follows:

> "The case presents an important question of Constitutional law that has not been, but obviously should be, settled by this Court."

In considering the propriety of the petition and whether or not the Court should exercise its discretion to grant it, it would seem to be important to note, that

no conflict is shown to exist between the different Circuits on this point.

The point has been settled in Minnesota. See the case of *Ralph D. Wilcox, et al., v. Charles J. Hedwall,* 185 Minn. 9. There the Court held that even though a trial by jury had been erroneously denied, the error was without prejudice if the trial before a judge was fair and complete, and the decision was the only one possible, as a matter of law on all the evidence.

C. J. S. 1711.

The following Federal cases announce the same rule:

Alley v. Bessemer Gas Engine Co. (5th Circuit), 262 Federal Reporter 94.

In the case of *Burke Grain Co. v. St. Paul-Mercury Indemnity Co.* (8th Circuit), 94 F. (2d) 458, (Cert. Den.), 58 Supreme Court 765, 303 U. S. 66, the Court said at page 463:

> "But, while it was error in the court to hold that the defendant had waived its right to a jury trial by interposing its motion with reservations for a directed verdict, it does not follow that this error resulted in prejudice to the defendant or requires a reversal. It could only be prejudicial if there were in fact substantial evidence upon which the jury might properly have returned a verdict in favor of the defendant. As said by us in General Tire Co. v. Standard Accident Ins. Co., supra: 'However, although taking the case from the jury was erroneous, nevertheless "the verdict will be sustained if the evidence was of such a conclusive character that it would have been the duty of the court to set aside the verdict had it been for the other party." Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., supra (210 U. S. 1, 28 S. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70).'"

It was stated in the case of *Forster v. Insurance Co. of North America* (2nd Circuit), 139 Federal (2d) 875, in a suit for money had and received,—

"Even if the denial of a jury trial was wrong, it was harmless error for there was no issue of fact to submit to a jury."

Respondent respectfully prays that the petition for certiorari be denied. Both the Lower Court and the Appellate Court fully stated the grounds upon which they reached their conclusion. Their conclusions are, moreover, legally and factually correct.

Dated May 29, 1948.

JOSIAH E. BRILL,
500 Builders Exchange Bldg.,
Minneapolis, Minnesota,
Attorney for Respondent.